

DENTONS

Establishing a business in Australia

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Establishing a business in Australia

1. Types of business entities

A business enterprise in Australia may be operated by an individual, a company, a trustee of a trust, a responsible entity of a managed investment scheme, a joint venture, a partnership, or a branch of a foreign company. A foreign investor may conduct business in Australia through any of these structures, subject to Australia's foreign investment review regime (discussed at Chapter 2). For example, a foreign government investor starting a new business in Australia requires notification to FIRB and the action cannot proceed until a notice of no objection is obtained. Most entities are primarily regulated by the Corporations Act, as well as ancillary regulations and tax legislation.

Australian companies

A foreign investor can establish an Australian incorporated company under the Corporations Act. Companies may be either proprietary (private) companies that are limited by shares (Pty Ltd), or public companies limited by shares or guarantee.

There are no minimum capital requirements for an Australian company.

All directors of an Australian company must have a Director Identification Number (DIN). A DIN is a 15-digit unique identifier provided to each director of a company upon application with the Australian Business Registry Services.

A proprietary company (Pty Ltd):

- Must have at least one but no more than 50 non-employee shareholders
- Must have at least one director who ordinarily resides in Australia
- May, but does not need to have a company secretary
- Must have a public officer for tax purposes
- Must have a registered office in Australia

A public company (Limited):

- Must have at least one shareholder, with no upper limit on the number of shareholders
- Must have at least three directors (two of whom must ordinarily reside in Australia)
- Must have at least one secretary (one of whom must ordinarily reside in Australia)
- Must have a public officer for tax purposes
- Must have a registered office in Australia
- Must appoint an auditor
- Must prepare annual financial reports (in certain circumstances, audited)
- May raise capital to offer shares and other securities to the public

Joint ventures

Two or more individuals or corporations may carry on business as a joint venture. Joint ventures may be incorporated or unincorporated. The rights of the parties involved in a joint venture are governed by a joint venture agreement, a unitholders' agreement (if the joint venture vehicle is a trust), or a shareholders' agreement (if the joint venture vehicle is a company). Joint venture arrangements are common in the context of mining companies, in particular junior miners.

Partnerships

A partnership is an agreement between two or more people or companies who decide to carry on business together with a view to profit. The rights and obligations of the partners are generally set out in a written partnership agreement. Partnerships are not a separate legal entity; the partners are jointly and individually liable for the debts of the partnership. Business partnerships of more than 20 persons are prohibited, except for certain professional partnerships.

Sole proprietors

A foreign investor may choose to carry on business in Australia as a sole proprietor trading under its own name, or under another business name. A sole proprietor is personally liable for all debts incurred by it in carrying on its business.

Trusts

A trust is a relationship where one person (the 'trustee') holds the legal title to investments or carries on the business on behalf of and for the benefit of others (the 'beneficiaries'). A trustee may be an individual or a company.

Managed investment schemes

A managed investment scheme is a structure which allows individuals or companies to pool funds for a common purpose to make a profit. If a scheme has 20 or more members or if it is promoted by a person who is in the business of promoting managed investment schemes, it must be registered with ASIC. Registered schemes must appoint a 'responsible entity' to operate the scheme, which must be a public company, and hold an Australian Financial Services Licence (AFSL).

Australian branch

A foreign company directly carrying on business in Australia (other than through a subsidiary), must register as a foreign company with ASIC to:

- Carry on business in Australia
- Establish or use a share transfer office or share registration office in Australia
- Administer, manage or deal with property in Australia as an agent, legal personal representative or otherwise

An Australian branch of a foreign company is not a separate legal entity. The foreign company will be liable for all debts and obligations of the Australian branch.

As a registered foreign company, the Australian branch of a foreign company must appoint have a local agent. The local agent of a registered foreign company is responsible for any obligations the company must meet and may be liable for any breaches or penalties. The requirement to have a DIN also applies to a director of a body corporate that is a registered foreign company.

2. Company and business names

Company names

A company name must indicate the company's legal status and the liability of its members (i.e. Pty Ltd or Limited). For a company to be registered, its name must not be identical or similar to another name already registered with ASIC. There are also certain words that are not allowed to be included in a company's name (e.g. the words 'Ambulance', 'Interpol' and 'Trust').

An applicant can reserve a company name for two months (with extensions of further two month periods at the discretion of ASIC) by having an application lodged with ASIC, even if the applicant is not yet ready to register the company.

Dentons can conduct name availability searches through ASIC and intellectual property searches to check if the preferred company name to be registered is available or might infringe someone else's rights.

Registering a particular company or business name may not stop another person from registering a similar name. It also does not give the registrant the exclusive right to use the name or part of the name or stop another person who has that name as a trademark from using it. The obligation to register a company or business name is separate to protecting any intellectual property rights in a name or brand, such as registering a trademark.

Business names

A business name must be registered with ASIC when:

- A company wishes to trade or carry on business under a name which is different from its company name
- An individual wants to carry on business under a name other than their own name
- A partnership wishes to carry on business under a name other than all the names of its partners

For example, if your name is Daniel Lee, and the name under which you want to trade for your business is 'Daniel Lee & Co', you will need to register the business name 'Daniel Lee & Co' with ASIC.

Registration of a business name does not, however, create a separate legal entity. Each registrant of a business name must have an Australian Business Number (ABN) or be in the process of applying for one with the Australian Business Register.

Mere registration of a business or company name (or a domain name, as discussed below in "Intellectual Property") does not of itself provide any intellectual property rights in the name; only a trade mark of that business, company or domain name gives that kind of protection. Registering a business name does not mean the same name will be available as a domain name or a trademark.

Dentons can conduct a business name availability search through ASIC and conduct the intellectual property searches to see if the preferred business name to be registered is available or if it might infringe someone else's rights.

3. Expansion into Australia via distributors, agents, licensees or local operations

A common method to expand into Australia is to use distributors, agents, commercial partners or licensees.

Australia has strict laws that regulate certain types of distribution, commercial agency and other trademark licensing arrangements (including franchise structures).

If the commercial arrangements with the distributor, agent or licensee in substance meets the very broad criteria for being a "franchise agreement", then regardless of the name of the agreement, it will be regulated as such under the Franchising Code of Conduct (Code). Many forms of trademark licences, distribution agreements, services agreements, collaboration agreements, commercial agency agreements and other types of commercial arrangements fall within the definition of a franchise agreement and it is often a very technical assessment and so legal guidance should be sought before any agreement is made or local operations commence.

Severe penalties apply for non-compliance with the Code (including pre-contract obligations).

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